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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-54

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, AND GULF STEVEDORE CORP.,
Petitioners,

versus

BILL LAW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves that this Court rehear this cause, that this Court request additional briefs and afford opportunity to reargue. As grounds Petitioner states the following:

1. The Maritime Bar is unable to determine the basis of admiralty jurisdiction as a result of the Courts opinion herein.

The Court, in deciding this case, has confused two distinct theories of admiralty tort jurisdiction with the result that if the opinion stands as it is, further litiga-

tion most certainly will follow. On the one hand the opinion appears to simply revitalize the discredited concept that admiralty tort jurisdiction is determined solely by the "locality" or "situs" of the wrong. On the other hand the Court appears to also recognize what the cases and commentators have labled the "locality plus maritime relation" theory.[1] These questions were not touched on in the briefs and were not

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[1]Whether locality is merely one of the tests for determining admiralty jurisdiction or the sole test, has always been subject to doubt and has furnished the thesis of a staggering amount of legal literature. The most famous question posed is "Mr. Benedicts Celebrated Doubt", which questions whether admiralty jurisdiction would extend to an assault between two bathers, which obviously does not involve and has no relation to the maritime industry. 1 E. Benedict, *The Law of American Admiralty*, Sec. 127 (6th Ed. 1940); "Despite the many cases saying that locality is enough for admiralty jurisdiction, this can hardly be regarded as settled." American Law Institute, *Study of The Division of Jurisdiction Between State And Federal Courts*, Sec. 1316 (a), (1969); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 Colum. L. Rev. 1084 (1964); Note, *Admiralty Jurisdiction over Torts*, 16 Harv. L. Rev. 210 (1903); Comment, *Torts Along the Waters Edge: Admiralty or Land Jurisdiction?*, 1968 U. Ill. L. F. 95; 23 Wash. & Lee L. R. 345 (1966); Palaez, *Admiralty Tort Jurisdiction — The Last Barrier*, 7 Duquesne L. Rev. 1 (1968). The lower courts have actually adopted three tests for admiralty jurisdiction. Palaez's article contains an excellent discussion of all three and concludes that the "nexus" test is most appropriate. The "nexus" test, discussed infra, allows admiralty jurisdiction over torts which have some nexus or connection with the purposes of maritime law, the controlling consideration being the torts relation to commerce and navigation. See *Smith v. Guerrant*, 290 F. Supp. 111 (S.D. Tex. 1968) for a detailed examination of all three tests and also concluding that the "nexus" basis is optimum; Note, 60 Mich. L. Rev. 208, (1961) where it is stated "no definitive judicial determination was ever made as to whether locality was the sole and exclusive test, or whether the martime character of the particular tortious act was likewise a relevant jurisdictional consideration."

argued orally by either party. What follows will clearly show the hazards that can be expected to flow from this holding and will demonstrate that rehearing with extensive briefs must be requested by the Court.

The confusion begins when the Court directs its inquiry with the following language.

> "Whether Federal Maritime Law governs this accident in turn depends on whether this is a case within the admiralty and maritime jurisdiction conferred on the District Courts by the Constitution and the Jurisdictional Statutes. More precisely, the threshold issue is whether Maritime Law governs accidents suffered by a longshoreman who is injured on the dock by allegedly defective equipment owned and operated by his stevedore employer. We hold that, under the controlling precedents, federal maritime law does not govern this accident. Nor in the absence of congressional guidance, are we now inclined to depart from prior law and extend the reach of the federal law to pierside accidents caused by a stevedore's pier based equipment."

In the paragraph following the above quoted language the Court cites *Thomas v. Lane*, 23 Fed. Cas. 957 (No. 13,902) (D.C. Maine 1813), and quotes from Mr. Justice Story's opinion: ". . . that the jurisdiction of the admiralty is *exclusively* dependent upon the locality of the act." (emphasis supplied) The language from that case and dictum from another of Justice

Story's opinions, *De Lovio v. Boit*, 7 Fed. Cas. No. 3776, that "jurisdiction is necessarily bounded by locality", were cited for perhaps one hundred years for the rule they embody.

It is suggested that if the Court had ended its opinion with the reference to the well understood, if arbitrary, "locality" test, the maritime bar would have been disappointed but at least would have been able to predict with reasonable certainty the forum in which to pursue their client's interests.[2]

However the Court has gone further and the result can only bring confusion. Following the reference to the *Thomas v. Lane* case the Court cites as controlling authority *Atlantic Transport Co. of West Va. v. Imbrovek*, 234 U.S. 52 (1914). The citation to *Imbrovek* is puzzling for that case is devoted almost entirely to a discussion of the locality plus maritime relation test for admiralty jurisdiction. The theory was first the basis of appellate decision in *Campbell v. H. Hackfield & Co.*, 125 F. 696 (9th Cir. 1903). There a longshoreman brought suit in admiralty for an accident aboard a ship in navigable waters. The Ninth Circuit denied admiralty jurisdiction stating "'the admiralty does not concern itself with non-maritime affairs.'" The judges noted that although decisions had continually indicated

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[2]That the situs or locality test is not as simple in application as might first appear is illustrated by the ". . . confusion and litigation over the difficulty in differentiating between objects or structures which take their character from the land to which they are in some way connected and those which are deemed so related to navigation as to become subjects of maritime jurisdiction", Comment, 23 Wash. & Lee L. Rev. 349 (1966).

that locality was the sole jurisdictional test, in every instance in which jurisdiction was sustained, a maritime relationship existed. Thus, the Court found that although locality remained the true jurisdictional test in the sense that any tort occurring upon navigable waters is within the power of admiralty, it would exercise that power only to take cognizance of *maritime torts*. The locality plus maritime relation test differs from the locality test then, in that it excludes nonmaritime torts committed in a maritime location.

This theory was urged upon the Supreme Court in *Atlantic Transport Co. of West Va. v. Imbrovek*, 234 U.S. 52 (1914). The Court expressly left the question open since it felt that even if "maritime nature" was an additional element of jurisdiction, it was present since,

> "(W)e entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill; it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as the mariners.' . . . if more is required than the locality of the wrong in order to give the Court jurisdiction,

> the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient."[3]

The test has recently found expression in *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727 (6 Cir. 1965), and *Hastings v. Mann*, 340 F.2d 910 (4 Cir. 1965).

In the instant case we find this Court quoting from the "locality" cases but then citing *Imbrovek* and going even further to say:

> "In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: Respondent Law was not injured by equipment which was part of the ship's usual gear or which was stored on board, the equipment which injured him was in no way attached to the ship, the fork lift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank."

The Court is saying that Bill Law has no "maritime tort", ie, that there is no maritime relation.

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[3] *Imbrovek* provided ammunition to those who opposed the locality test as arbitrary, irrational, and bearing no relation to the purpose of admiralty jurisdiction, as well as a blind following of history. See, e.g., Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259 (1950); Ryan, *The Amphibious Tort Problems*, 13 Brooklyn L. Rev. 129, (1947); Bruncken, *Tradition and Common Sense in Admiralty*, 14 Marq. L. Rev. 16 (1929).

This Court then has made two findings, (1) that the location of the tort was ashore and (2) that there is no maritime relation. What will surely baffle the reader, however, is why the Court quotes from the cases stating that "locality" is the *exclusive* test of jurisdiction. Similarly, if the Court is not establishing the locality plus basis of jurisdiction why does it go further to find there is no maritime tort since if locality is the exclusive test there is no conceivable reason to look further.

We cannot urge too strongly upon the Court that this is no matter of mere academic interest. Since the Court has chosen to speak in terms of fundamental jurisdictional concepts, there are numerous areas outside the longshore-maritime industry where guidance is required. This case has thus taken on proportions which must not have been anticipated when the opinion was written. For example if the opinion is taken to mean that situs or locality is the exclusive test of jurisdiction what is to happen to the following line of cases?

a. *Chapman v. Grosse Point Farms,* 385 F.2d 962 (6 Cir. 1967) wherein a swimmer who dove off a pier into 18 inches of water brought suit in admiralty. The Sixth Circuit held there was no admiralty jurisdiction even though the accident happened on navigable water.

b. *Smith v. Guerrant,* 290 F. Supp. 111 (S.D. Tex. 1968) in which admiralty jurisdiction was refused where a crane dropped a fork lift machine into navigable waters while trying to move it along a pier.

c. *McGuire v. New York,* 192 F. Supp. 866 (S.D. N.Y. 1961) where a swimmer injured his hand under water at a public bathing beach. Admiralty jurisdiction was denied, the Court saying "(O)nly those torts which have a maritime character" can be brought in admiralty.

d. *Scott v. Eastern Airlines,* 399 F.2d 14 (3 Cir. 1968) is a typically complex aviation disaster occurring on navigable waters within a state. The Court recognized there could be admiralty jurisdiction. If the Court herein is establishing the locality plus maritime relation test as the jurisdictional criteria then what is to happen in the fast developing field of admiralty — aviation law. Can it be said that the death of or injury to an airlines passenger is more maritime in nature than similar injuries to a longshoreman?[4]

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[4]The leading case involving aircraft accidents within the territorial (and navigable) waters of a state is *Weinstein v. Eastern Airlines, Inc.,* 316 F.2d 758 (3 Cir. 1963); See also, *Wilson v. Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1965); *Pearson v. Northeast Airlines,* 309 F.2d 553 (2 Cir. 1962); 309 F.2d 553 (2 Cir. 1962); *Griffith v. United Airlines, Inc.,* 416 Pa. 1, 203 A.2d 766 (1964). Applying the locality test admiralty jurisdiction has been upheld in cases involving water skiers, *King v. Testerman,* 214 F. Supp. 335 (E.D. Tenn. 1963); Where a lamp-post fell from a wharf and struck a seaman aboard a vessel, *McDonald v. Cape Cod Trawling Corp.,* 71 F. Supp. 888 (D.C. Mass. 1947), where the Court upheld admiralty jurisdiction stating that the locality rule applied and that locality was determined ". . . where the last event necessary to make an actor liable for an alleged tort occurs"; *City of Lincoln,* 25 F. 835 (S.D. N.Y. 1885) and *Firemans Fund Inc., Co. v. City of Montrey,* 6 F.2d 893 (N.D. Cal. 1925), Admiralty jurisdiction allowed where piers collapsed and Plaintiff's goods thrown into navigable waters; for contrary holding see; *Thompson v. Chesapeake Yacht Club, Inc.,* 255 F. Supp. 555 (D. Mc. 1966), where admiralty jurisdiction disallowed when Plaintiff fell through a hole in Respondents pier.

As these cases illustrate admiralty jurisdiction has been allowed in numerous and diverse circumstances. In many cases jurisdiction is upheld where the accident has absolutely no relationship to the purposes of admiralty jurisdiction nor to maritime law itself. The situs test would allow suit in admiralty for a simple accident involving swimmers or water skiers but would disallow jurisdiction to a longshoreman such as Bill Law who is an essential element in the maritime industry. In such manner does rigid adherance to ancient precedent pervert the very reason for its existence.

The facts of the instant case present the Court with an opportunity to speak definitively to the problems of admiralty jurisdiction. It is submitted, however, that this cannot be done unless rehearing is granted and the various policies underlying each of the three proposed tests are thoroughly briefed and argued by the parties.

2. Admiralty Tort Jurisdiction Should Depend Upon The Relationship Of The Tort To The Purposes Of Maritime law. Jurisdiction Should Not Be Limited By The Arbitrary Confines Of The "Locality Test", Nor By The Only Slightly Less Arbitrary Confines Of The "Locality Plus Maritime Relation Test".

We have noted earlier that the lower courts have adopted three tests for admiralty jurisdiction. Two of these, the locality test and the locality plus maritime relation test, have been discussed in Section One of this petition and it has been shown that considerable

misunderstanding can be expected if the opinion remains as it stands. The third test for jurisdiction has come to be known as the "nexus" test. These three concepts have been the focal point of a great deal of debate in the lower courts and among legal scholars in the field of maritime law for years.

Generally, the nexus test would allow admiralty tort jurisdiction under similar circumstances that jurisdiction is allowed in cases of maritime contracts. Here, jurisdiction is recognized " . . overe all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea . . ."[5]

The nexus test, then, recognizes that the maritime law has developed to meet the special requirements of those endeavors which relate to the "business or commerce of the sea."

Professor Black states:

> "The law of admiralty, or maritime law, may tentatively be defined as a corpus of rules, concepts, and legal practices governing certain centrally important concerns of the business of carrying goods and passengers by water . . . Its tie with a single industry, and its separate, long continued, and international traditions and history mark it off quite distinctly from the relatively interpermeating

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[5] *De Lovio v. Boit*, 7 Fed. Cas. at 444.

branches of shoregoing law — with which, nonetheless, it has numerous relations".[6]

"It arose and exists to deal with problems that call for legal solution, arising out of the conduct of the sea transport industry"[7]

The American Law Institute has expressed a similar policy in its Commentary on Admiralty and Maritime Jurisdiction.

"The Admiralty and Maritime jurisdiction extends to and includes all claims arising out of any maritime transaction or occurance irrespective of where the claim arose or the damage or injury occurred"

"This would make it clear that all transactions and occurrences maritime in fact are included within maritime jurisdiction irrespective of locality. It would be generally informative and would be helpful in reaching the right result in situations such as pierside damage and injury arising out of maritime transactions."[8]

In *Atlantic Transport Co. of West Va. v. Imbrovek*, 234 U.S. 52, 58 L.Ed. 1208 (1914) this Court clearly rec-

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[6]Gilmore and Black, *The Law of Admiralty*, 1, (1957).
[7]Id. at 11.
[8]American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Sec. 1316 (a), (1969). Proposed draft.

ognized that the longshore industry and the workers therein are an essential cog in the commerce of the sea. There it was said:

> "We entertain no doubt that the service in loading and stowing a ship's cargo is of this character . . . it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs' as the mariners' ".

The locality test of admiralty jurisdiction, in any form, ignores the fact that the pier itself is the focal point for the entire maritime industry. It is there that the very substance of that industry, the meeting of ships, cargo and men, takes place, and it is there that the maritime law should be concerned. The locality test illogically and arbitrary divides an entire industry's standard of care.

The nexus test of admiralty jurisdiction would not change the obligations of the Shipowner or the Stevedore Company to provide safe equipment and appliances. They are fully aware that while a forklift machine works on the dock one day, the next day it will be aboard ship and the warranty of seaworthiness is resumed. In *Moragne v. States Marine Lines, Inc.* 398 U.S. 375, 26 L.Ed. 2d 339 (1970) this Court held that the general maritime law recognized a remedy for wrongful death based on unseaworthiness. It was there said:

> "The confidence of people in their ability to predict the legal consequences of their actions

is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations. 'If the new remedial doctrine serves simply to reenforce and make more effectual well-understood primary obligations, the net result of innovation may be to strengthen rather than to disturb the general sense of security.' "

These same principals underlie the instant case. The nexus test of admiralty jurisdiction provides a logical

and realistic vehicle for handling maritime injuries whether they occur on the dock or the ship.

In our brief on the merits herein it was felt that it was not necessary to discuss the important policy considerations involved in the three jurisdictional issues here brought to the attention of the Court. The reason for this is obvious. First, the District Court's opinion in granting Summary Judgment was not addressed to these issues; second, the opinion of the Fifth Circuit in reversing the District Court was not concerned with these issues; third, and in fact, none of the Courts of Appeal which have decided cases similar to this have felt it necessary to approach these considerations; fourth; the Petitioner, Victory Carriers, in its brief mentioned the jurisdiction question only in passing and was content merely to cite this Courts' opinion in *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 90 S.Ct. 347 (1969)

This Court, then, has made a radical departure from the developing maritime law and has done so without briefs of counsel and without argument. It is strongly urged that this opinion will cause more problems than it can possibly solve, that the Court has not fully considered the competing policies involved and that Rehearing should be granted with additional briefs of counsel and re-argument.

CONCLUSION

The opinion of this Court herein is confusing and as a result the bar is unable to determine the proper

basis of admiralty jurisdiction. The imporant issues of policy raised by the Court should be, but have not been briefed by the parties. Therefore it is respectfully urged that Rehearing be granted, that additional briefs be requested and the opportunity to reargue be afforded.

Respectfully Submitted

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PROOF OF SERVICE

I, Ross Diamond Jr., one of the attorneys for the Respondent herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the ____ day of Jan. 1972, I served three copies of the foregoing brief of Respondent on Victory Carriers Inc., and Gulf Stevedore Corp., by mailing to same in duly addressed envelopes with first class postage prepaid to Hon. George Wood, 510 Van Antwerp Building, Mobile, Alabama 36601, and to Hon. W. Boyd Reeves, 1101 Merchants National Bank Building, Mobile, Alabama 36602, Attorneys for Petitioners.

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CERTIFICATE OF GOOD FAITH

I, Ross Diamond Jr., one of the attorneys for Respondent, Bill Law, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Ross Diamond, Jr.
Counsel for Respondent